CHAN KWAI CHUN

v.

LEMBAGA KELAYAKAN

HIGH COURT MALAYA, KUALA LUMPUR
ARIFIN ZAKARIA J
[ORIGINATING SUMMONS NO: R2-17-95-01]
24 JANUARY 2002

ADMINISTRATIVE LAW: *Exercise of administrative powers - Judicial review - Decision of Qualifying Board nullifying results of Certificate of Legal Practice examination - Whether amenable to judicial review under s. 26(1) Legal Profession Act 1976 - Whether estoppel applied when results first announced - Whether candidates given a right of hearing before decision was taken - Whether decision tainted with mala fide - Whether public interest favoured decision taken*

LEGAL PROFESSION: *Qualifying Board - Decision nullifying results of Certificate of Legal Practice examination - Whether amenable to judicial review under s. 26(1) Legal Profession Act 1976 - Whether estoppel applied when results first announced - Whether candidates given a right of hearing before decision was taken - Whether decision tainted with mala fide - Whether public interest favoured decision taken*

This was the plaintiff's application for review of the decision of the defendant to nullify the results of the July 2001 Certificate of Legal Practice examination under s. 26(1) of the Legal Profession Act 1976 ('the Act'). The plaintiff obtained a clear pass therein but after the nullification of the results, the plaintiff was issued a new certificate stating that he had failed the examination. Hence, the application.

The defendant in its affidavit in reply stated that it had received information that the examination papers had been leaked. In the course of investigation, it was discovered that the marks contained in the master list in respect of certain papers were distinctly different from the marks given by the original examiners in the candidates' answer scripts and that its Director was responsible for tampering with the marks. The defendant then decided to annul the results and re-grade the candidates based on the actual marks awarded by the original examiners.

Held:

[1] The decisions of the defendant complained of were not the kind of decisions amenable to a review by the court under s. 26(1) read together with s. 26(7) of the Act. The order that the judge may make under s. 26(7) is restricted only to "any order under this Act". The case of *Loganathan a/l Suppiah v. Lembaga Kelayakan Profession Undang-Undang Malaysia* was followed. The application ought to have been made under s. 41 of the Specific Relief Act 1950 based on the nature of the complaints and the relief prayed for by the plaintiff. (pp 294 a-d & 295 d-e)

[2] The plaintiff did not allege in his affidavit that he had, in any manner, acted to his detriment or prejudice as a result of the defendant's declaration of the results of the examination. Further, the defendant was entitled, if not duty bound, to revoke the results of the examination. The doctrine of estoppel could not operate against the defendant in the circumstances. (pp 298 b & 299 d)

[3] The defendant invited the candidates who were dissatisfied with the revised results of the examination to appeal and the plaintiff was one of the candidates who had appealed. The right of appeal, even though administrative in nature as opposed to a statutory right of appeal, did give the plaintiff a right of hearing. Further, because of the large number of candidates involved, it was not practicable for a hearing to be given to the plaintiff or any other candidates and any hearing would not have made any difference. The plaintiff was not prejudiced in any way by the failure on the part of the defendant to afford him the right of hearing. Hence, such a failure could not vitiate the decision to revoke the examination results. (pp 300 g-h & 301 f)

[4] The defendant could not have waited for the completion of police investigation before revoking the examination results. The reason being, police investigation papers were not accessible to the defendant and the investigation itself might take a long time. Time was of the essence and the defendant had to act fast in order to put matters to rest. The conduct of the defendant was far from being casual or cavalier. Also, the court could not decide on whether the defendant should take responsibility for the conduct of its Director as it was not sitting in judgment over the conduct of the Director. In the circumstances, the conduct of the defendant was not *mala fide*. (p 302 d-h)

[5] There was ample evidence to show that the results issued to the plaintiff was based on the master list presented by the Director to the defendant. The defendant was satisfied, after due investigation, that the results shown in the master list were erroneous. It was not open to the court to interfere

with the evaluation of evidence or conclusions of fact reached by the defendant unless it was satisfied that the defendant had misdirected itself on law. Judicial review is concerned with the legality and not the merits of a decision. In the circumstances, the defendant had properly exercised its discretion in revoking the examination results. (pp 304 h & 305 b)

[6] Public interest demanded that the defendant ought to revoke the results of the examination in order to preserve the image and integrity of the legal profession in the country. (p 306 a-b)

[Application dismissed.]

Case(s) referred to:

Alloy Automative Sdn Bhd v. Perusahaan Ironfield Sdn Bhd [1986] 1 CLJ 2; [1986] CLJ (Rep) 45 ***(refd)***

Bishop v. Ontario Securities Commission [1964] 41 DLR (2d) 24 ***(refd)***

John Peter Berthelsen v. Director General of Immigration, Malaysia & Ors [1986] 2 CLJ 409; [1986] CLJ (Rep) 160 ***(refd)***

Karam Singh v. Menteri Hal Ehwal Dalam Negeri, Malaysia [1969] 2 MLJ 129 ***(refd)***

Kassim Sulong & Anor v. Guthrie Estates Holdings Ltd & Ors [1994] 3 CLJ 186 ***(refd)***

Kedar Lal Verma, petitioner v. The Secretary, Board of High School and Intermediate Education & Anor, respondents AIR [1980] 67 Allahabad 32 ***(refd)***

Loganathan Suppiah v. Lembaga Kelayakan Profession Undang-undang Malaysia [1997] 3 CLJ 914 ***(foll)***

Merdeka University Bhd v. Government of Malaysia [1981] CLJ 175; [1981] CLJ (Rep) 191 ***(refd)***

MJP Rohilkhand University Bareilly, appellant v. Harjendar Singh & Another, respondents AIR [2001] Allahabad 192 ***(refd)***

MUI Bank Bhd v. Alkner Investment Pte Ltd [1990] 3 MLJ 385 ***(foll)***

Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 ***(refd)***

Pravesh Kumar Dubey v. University of Kanpur [1990] 2 UPLBEC 1053 ***(foll)***

Re Canadian Forest Products Ltd [1960] 24 DLR (2d) 753 ***(refd)***

Re Liverpool Corporation, ex p Liverpool Taxi Fleet Operators Association [1975] 1 WLR ***(refd)***

Reg v. Criminal Injuries Compensation Board, ex p A [1999] 2 AC 330 ***(refd)***

Reid v. Secretary of State for Scotland [1999] 2 AC 517 ***(refd)***

Rootkin v. Kent County Council [1981] 2 All ER 227 ***(refd)***

Russel v. Duke of Norfolk [1949] 1 All ER 109 ***(refd)***

Tesco Stores Ltd v. Secretary for the Environment [1995] 2 All ER 636 ***(refd)***

Legislation referred to:

Legal Profession Act 1976, ss. 4, 8(3), 21(1), (4), 22, 23, 26(1), (7)

Rules of the High Court 1980, O. 41 r. 5(2)

Specific Relief Act 1950, s. 41

Other source(s) referred to:
AWR Wade & CF Forsyth, *Administrative Law*, 7th edn, pp 268, 270
SA de Smith, *Judicial Review of Administrative Action*, 1959

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For the plaintiff (Case No: OS R2-17-94-01) - Sivaloganathan (Yugan Pathmanathan & Yau Jick Hua); M/s Yau Jick Hua
For the defendant - Tan Sri Zaki Tun Azmi (Elvin John); M/s Rashid & Lee
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JUDGMENT

Arifin Zakaria J:
The plaintiff was one of the candidates who sat for July 2001 Certificate of Legal Practice examination ("the July examination"). The defendant is a body established under s. 4 of the Legal Profession Act 1976 ("the Act") referred to therein as the Qualifying Board. Among the functions of the defendant is to provide courses of instruction for, and for the examination of, persons whose qualifications are not sufficient to make them qualified persons for the purposes of the Act except after undergoing the courses and passing the examination. The July examination was conducted by the defendant pursuant to the said function. The results of the July examination was announced by the defendant on 13 September 2001. The plaintiff obtained a clear pass. The certificate – exh. "CKC1" – was accordingly issued to the plaintiff. On 12 November 2001 the defendant through its officials announced that there had been leaks in the July examination. This was followed by the nullification of the results of 13 September 2001. A new certificate dated 27 November 2001 was then issued to the plaintiff – exh. "CKC2" stating that the plaintiff had failed the July examination.

The defendant in its affidavit in reply affirmed by Dato' Abdul Wahab Said Ahmad, the secretary of the defendant, narrated the events that led to the annulment of the results of the July examination. They are as follows. He stated that pursuant to the powers under s. 8(3) of the Act the defendant appointed one Khalid bin Yusof to the post of Director of Examination ("the Director") for the Certificate of Legal Practice ("the CLP") examination. Among his duties are to arrange for and to conduct CLP examination in accordance with the rules as determined by the defendant. According to Dato' Abdul Wahab the normal procedure is that the papers for the CLP examination are marked in accordance with the scheme of marks and grades issued by the defendant. (See exh. "C".)

Initially the papers are examined by an examiner and thereafter the papers are re-examined by another examiner. Eventually the marks for all the five papers are then entered into a "Master List Report" ("the master list") prepared by the Director and if necessary the marks so entered will be counter checked by an examination board appointed by the defendant. After having done all that the Director will then table the results of an examination through the master list to the defendant for its endorsement and approval. The results of the July examination as contained in the master list were duly tabled and approved by the defendant. Some time around 10 November 2001, he said, the defendant received information concerning leakages of the July examination papers, and upon due investigation the defendant was satisfied that the July examination and the October examination had in fact been compromised. In the circumstances, on 12 November 2001 the defendant decided to nullify the results of both the examinations. He further stated that in the course of investigating the leakages in the July examination papers the defendant discovered that the marks as contained in the master list in respect of certain papers were distinctly different from the marks given by the examiners in the candidates answer scripts.

The plaintiff's marks, according to the answer scripts, for civil procedure was 29 1/2, while that of criminal procedure was 33. Whereas the marks entered on the master list for both the papers were 40, which is the pass mark for the said examination as set out in the scheme of mark and grade issued by the defendant. Upon investigation it was found that the Director was responsible for tampering with the marks. When queried by the defendant, he said, the Director could not offer any plausible explanation.

He then went on to say that on 26 November 2001, following appeals by the candidates and the Malaysian Bar Council, the defendant resolved that the decision of 12 November 2001 be revoked on condition that the candidates will now be given the actual marks that were awarded by the original examiner/examiners as stated in the answer scripts. And in regard to the plaintiff, he said, after checking the marks of the plaintiff as awarded by the original examiners, it was found that the plaintiff failed both the civil procedure and criminal procedure papers. On the above premise, he said the earlier certificate issued to the plaintiff was revoked and replaced with a new certificate dated 27 November 2001.

At the outset I should state that apart from this case, 14 similar applications have been filed based on the same grounds as the plaintiff herein. In the course of the hearing it was agreed between all parties that the decision of this court in the present case will be binding on these 14 other cases ie, O.S. Nos. R2-17-96-01 to R2-17-109-01.

There is, one other case, that is O.S. No. R2-17-94-01 which needs special mention here. There the application was made under s. 41 of the Specific Relief Act 1950 ("SRA"). In the course of the arguments it was agreed that this case too would follow the decision of the court in the present case and whatever decision made by this court in the present case will be binding on the said case. It was further agreed that the application in R2-17-94-01 is deemed to have been commenced under s. 26 of the Act, and consequently the plaintiff in that case is deemed to have abandoned his claim under s. 41 of the SRA.

Preliminary Objection

With that background I will now consider the preliminary objection raised by Tan Sri Zaki with regard to this application. He contended that the decisions of the defendant which are sought to be impugned by the plaintiff are not amenable to review under s. 26 of the Act.

To address this issue we need to consider, first the nature of the complaints against the defendant. The plaintiff's complaints basically are against the decisions of the defendant in annulling the CLP dated 13 September 2001, the subsequent regrading exercise carried out by the defendant and the issuance of the new certificate to the plaintiff dated 27 November 2001. The plaintiff contended that the actions of the defendant are illegal, arbitrary and contrary to law and, therefore, ought to be quashed and set aside by this court and the defendant be directed to declare the July 2001 results as lawful and valid.

It is contended for the defendant that the court's power of review under s. 26 is only limited to decisions of the defendant under ss. 21, 22, and 23 of the Act. In brief, s. 21(1) relates to conditions required to qualify as principal to an articled clerk, while s. 21(4) provides that if any advocate and solicitor takes an articled clerk in contravention of the said section the defendant may of its own motion discharge the articles of the articled clerk upon such terms, including terms as to return of any premium, as the defendant thinks fair and reasonable. Sections 22 and 23 deal with discharge of articled clerks. It is submitted for the defendant that only in these three instances can resort be had to the court for a review of the defendant's decision under s. 26(1) of the Act.

Mr. Karpal for the plaintiff submitted that the court's power to review as provided in s. 26(1) should not be construed so restrictively as suggested by Tan Sri Zaki. He contended that s. 26(1) clearly provides that any decision of the defendant is subject to review by the court. Thus, he said, it confers on the court a very wide and unrestricted power.

Having considered the submissions of both parties I am of the view that s. 26(1) should be read together with s. 26(7) of the Act, which provides as follows:

> (7) At the hearing the Judge may dismiss the applications or make **any order under this Act** as he considers fair and reasonable. (emphasis added.)

Reading the two subsections together I am in agreement with the submission of Tan Sri Zaki that the decisions of the defendant complained of in this case are not the kind of decisions which are amenable to a review by the court under s. 26(1). I arrive at this conclusion on the premise that the order that the judge may make under s. 26(7) is restricted only to "any order under this Act." The question is, what are the orders that may be made under the Act. This is not anywhere defined. However, I don't think that the relief prayed for by plaintiff in this case are the kind of relief that the court can grant under the Act. In support I would refer to the case of *Loganathan a/l Suppiah v. Lembaga Kelayakan Profession Undang-undang Malaysia* [1997] 3 CLJ 914. In that case the plaintiff sat for CLP examination in August 1996. He was not successful in the said examination. Being dissatisfied with the result, he filed an originating summons against the defendant for a review under s. 26 of the Act and pursuant to s. 41 of the Specific Relief Act 1950 ("SRA"). In regard to s. 26 Abdul Kadir Sulaiman J (as he then was) had this to say at p. 920:

> Therefore, the said subsections of s. 26 relate to the review of the 'decision' of the board by a judge, and if after hearing the application of the person dissatisfied with the said decision, the judge allows the application, then the judge may make an order as he considers fair and reasonable. However, the order that he is allowed to make is one under the LPA 1976 and not any order extraneous to the one allowed under the LPA 1976. So, what then are the decisions of the board which is subject to review under s. 26(1) of the LPA 1976 – and what are the orders under the LPA 1976 which the judge could make upon the application being successful. ...

And at p. 921 he said:

> ... Learned counsel listed out examples wherein the decision of the defendant would be subject to review under s. 26. They were the provisions relating to the decision of the defendant under s. 21 – when the defendant refused special leave sought to qualify an advocate and solicitor of less than seven years standing and not in active practice, to be a principal, or where the defendant discharged the articles of the articled clerk pursuant to sub-s. (4) thereof Another instance was where the defendant discharged the articles of the articled clerk under ss. 22 or 23 of the LPA 1976. Learned counsel further submitted that even if he was wrong in relation to the function of the defendant to provide an examination not being a decision, in the light of s. 26(7), the plaintiff would have no remedy because the LPA 1976 does not have a

> provision allowing the judge to order the defendant to issue the plaintiff with the CLP as sought by the plaintiff in this application. The plaintiff, on the other hand, made no submissions at all on this point. Again, I share the view of En Royan on this in that in carrying out a function under s. 5(e) of the LPA 1976, the defendant was not making any decision within the meaning of s. 26(1) of the LPA 1976, for reading the subsection with the powers given to the judge under sub-s. (7) thereof, there was no power given by the LPA 1976 for the judge to make any order under it which, in this case, was to order the defendant to issue the CLP to an aggrieved party. ...

The learned judge dismissed the plaintiff's application for review under s. 26 on the ground that it was frivolous and vexatious and an abuse of the process of court. The plaintiff in that case appealed against the decision of learned judge to the Court of Appeal (Ref. No. W-01-405-97). The Court of Appeal on 18 November 1997 dismissed the appeal, and affirmed the decision of the learned judge. No written judgment has been delivered by the Court of Appeal. In the circumstances I presume that the Court of Appeal agreed with the reasoning of the learned judge in that case. Thus following *Loganathan (supra)*, and for the reasons I have stated earlier, I would dismiss the plaintiff's application herein on the ground that the application could not appropriately be made under s. 26 of the Act. And if I may add, based on the nature of the complaints and the relief prayed for by the plaintiff herein, I am of the opinion that the application ought to have been made under s. 41 of SRA.

In view of my finding above, it may no longer be necessary for me to consider the merits of this application. However, in view of the lengthy submissions on the merits I propose to give my view on the issues as canvassed by the parties.

Admissibility Of Exhs. "D" And "F" Annexed To Dato' Abdul Wahab's Affidavit

It was the plaintiff's contention that these two exhibits are not admissible on the ground of hearsay, as the maker of these two documents did not affirm an affidavit tendering the same. Perhaps I should state that this argument was raised by Mr. Karpal in his closing submission. Despite that I allowed him to raise this new point at this late stage on condition that the defendant's counsel be given the right to reply.

The contention of Mr. Karpal is that since this is an originating summons, therefore, the exception in O. 41 r. 5(2) of the Rules of the High Court 1980 is not applicable. On that premise he contended the two documents could not be tendered through Dato' Abdul Wahab as was done here. He cited the case of *MUI Bank Bhd. v. Alkner Investment Pte. Ltd.* [1990] 3 MLJ 385 and *Kassim bin Sulong & Anor v. Guthrie Estates Holdings Ltd. & Ors.* [1994] 3 CLJ 186 in support of his contention. I think there is force in his contention and on that premise I hold that these two documents are inadmissible and no weight whatsoever should be given to them.

He further argued that without these two documents there is nothing before the court to show that the defendant's decisions sought to be impugned by the plaintiff were fair and reasonable. In reply Tan Sri Zaki contended, even if the court were to accept Mr. Karpal's contention and consequently ignored those two exhibits there is still ample evidence before the court for it to come to a definite finding whether the defendant's decisions were fair and reasonable. On that premise I will proceed to consider this application without regard to the two exhibits.

Estoppel

The next issue raised by Mr. Karpal is that the defendant in the exercise of its functions under the Act could not revoke the CLP dated 13 September 2001 issued to plaintiff. He said in law the plaintiff is estopped from doing so. He relied on a number of Indian authorities in support of his contention. I do not propose to refer to all of them as they established the same principle. Firstly I would refer to the case *M.J.P. Rohilkhand University Bareilly, Appellant v. Harjendar Singh and another, Respondents* AIR [2001] Allahabad 192. In that case S.K. Sen CJ at p. 194 said:

> After considering the facts of the case and the legal position involved in the case, I have no hesitation in coming to the conclusion that it was not open to the University of Gorakhpur to cancel the results of the petitioners of LL.B. Part II Examination as there is not an iota of evidence to suggest that the petitioners were party to the interpolations made or fraud committed in declaration of the results in their favour. The University on other hand, before admitting the petitioners for appearance at the LL.B. Part III Examination had ample opportunity to discover the fraud committed and refuse them permission to appear at the LL.B. Part II Examination 1976. However, communication of the results through mark-sheets issued by the principal of the College amounts to declation of results by the principal of the College amounts to declaration of results by the University. The University, in my opinion is therefore, clearly estopped from cancelling the results of the petitioners of LL.B. Part II Examination 1975.
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> 4. The other decision on which reliance has been placed on behalf of the writ petitioner/respondent is *Pravesh Kumar Dubey v. University of Kanpur* [1990] 2 UPLBEC 1053 wherein, on the facts of that case, the learned Judge held as under:
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> > The question for consideration before me is as to who is to be punished and who is to suffer for the mistake of the University in issuing incorrect mark sheet. Mistakes can be corrected by the authorities at any time provided some other person has not changed his position on the basis of those mistakes. Equities are to be adjusted in favour of one who will suffer most, if the mistakes are permitted to be corrected. Nobody will be allowed to suffer for the mistakes of others. In all fairness the University is to be estopped from refusing to declare the result of B.Sc. Part II of the petitioner.

5. In the aforesaid decision of learned single Judge, a Supreme Court judgment in *Sanatan Gauda v. Berhampur Universit*y 1990 (2) JT57: (AIR [1990] SC 1075) was also considered and it was further held in paragraph 5 of the judgment at pages 1055 and 1056 as follows:

> In *Sanatan Gauda v. Berhampur University* [1990] (2) JT 97 (AIR [1990] SC 1075). University withheld the result of a student of Pre-Law and Inter Law examinations on the ground that he secured less than minimum marks in Ma (sic) and was, as such, not eligible for admission to the Law course. Hon'ble Supreme Court held that student was admitted to Law College on the basis of the mark sheet issued by the University and the student cannot be punished for the negligence of the University authorities. The relevant extract from the judgment is quoted below:
>
> > This is apart from the fact that I find that in the present case the appellant while securing his admission in the Law College had admittedly submitted his marks sheet along with the application for admission. The Law College had admitted him. He has pursued his studies for two years. The University had also granted him the admission card for the pre-law and intermediate Law examinations. He was permitted to appear in the said examinations. He was also admitted to the Final Year of the Course. It is only at the stage of the declaration of his results of the Pre-Law and Inter Law examinations that the University raised the objection to his so-called ineligibility to be admitted to the law course. The University is, therefore, clearly estopped from refusing to declare the result of the appellant's examination or from preventing him from pursuing his final year course.
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> It was further observed that a student cannot be punished for the negligence of the University authorities and it was the bounden duty of the University to have scrutinised the matter thoroughly before permitting the appellant to appear at the examination and not having done so it cannot refuse to publish his result.

From the passage cited above I don't think it is true to say that in all cases mistakes by an administrative body, such as the defendant, could not be corrected on the ground of estoppel. For instance in the case of *Pravesh Kumar Dubey v. University of Kanpur* [1990] 2 UPLBEC 1053 which was cited with approval by Sen CJ the learned judge has stated clearly that:

> Mistakes can be corrected by the authorities at any time provided some other person has not changed his position on the basis of those mistakes.

That, I must say, is the correct statement of the law.

The learned authors A.W.R. Wade & C.F. Forsyth in their book, *Administrative Law* (7th edn.) at p. 268 states as follows:

> The basic principle of estoppel is that a person who by some statement or representation of fact causes another to act to his detriment in reliance on the truth of it is not allowed to deny it later, even though it is wrong. Justice here prevails over truth.

In the present case the plaintiff did not anywhere in his affidavit allege that he had in any manner acted to his detriment or prejudice as a result of the defendant's declaration of the results of the July examination.

It should further be noted that the doctrine of estoppel is not without limitation in the public law sphere. On this, learned authors Wade and Forsyth in the same book (above) at p. 270 stated:

> In the public law the most obvious limitation on the doctrine of estoppel is that it cannot be invoked so as to give an authority power which it does not in law possess. In other words, no estoppel can legitimate action which is *ultra vires*.

To illustrate the above points further I would refer to the case of *Kedar Lal Verma, Petitioner v. The Secretary, Board of High School and Intermediate Education and another, Respondents* AIR [1980] 67 Allahabad 32, a case cited by Tan Sri Zaki. In that case the facts were – a candidate appeared for High School examination and the marks sheets granted to him showed that the marks got by him was less than that required for a pass, but in another column he was by clerical mistakes, mentioned to have "passed" the examination, it was held that the Board of High School and intermediate examination was not estopped from declaring the candidate as "failed" in the examination, as the candidate must have known from the marks in the marks sheet that his marks were less the pass marks.

Further, it was held that it would not be possible to enforce the representation against the Board because the Board cannot be compelled to act contrary to the statute. The Board it said, did not have the power to declare the petitioner had passed the examination. The declaration made by the Board was thus against the power conferred upon it. It was also said that as a general rule the party claiming an estoppel must have acted on the belief induced by the other party.

In the present case it is clear from exh. "C" (schemes of Marks and Grades for Examination) annexed to Dato' Abdul Wahab's affidavit the pass marks for each subject as determined by the defendant is 40 out of 100. Paragraph 5 of the said exhibit states:

5. Pass in the Examination:

(a) No candidate shall be deemed to have passed the examination unless he has obtained at least 40 marks in each of the five prescribed subjects at one sitting.

(b) A candidate who has failed on two papers shall be deemed to have failed the examination.

Dato' Abdul Wahab in his affidavit at para. 17 said, *inter alia*:

17. ... Bagi pihak Plaintiff apabila markah-markah diteliti, adalah didapati bahawa markah-markah yang diberi oleh Encik Khalid bin Yusoff adalah 40 untuk Prosedur Sivil dan 40 untuk Prosidur Jenayah manakala markah-markah yang diberi oleh pemeriksa adalah 29% untuk Prosedur Sivil and 33 untuk Prosedur Jenayah. Ini bermakna Plaintif diberi 10% tambahan untuk Prosedur Sivil and 7 markah tambahan untuk Prosedur Jenayah.

Based on the above I am of the view that the defendant is entitled, if not duty bound, to revoke the results of the July examination. The doctrine of estoppel could not operate against the defendant in the circumstances of this case.

Legitimate Expectation And Right Of Hearing

It is contended for the plaintiff that by issuing the CLP to the plaintiff this gives the plaintiff, at the very least, a legitimate expectation that it would not be revoked without giving him the right of hearing. Failure of the defendant in this case to afford the plaintiff the right of hearing before revoking the July examination results would thus render the revocation liable to be quashed by the court. In support Mr. Karpal referred to the case of *John Peter Berthelsen v. Director General of Immigration, Malaysia & Ors.* [1986] 2 CLJ 409; [1986] CLJ (Rep) 160 where it was held that the appellant was not afforded the right of hearing before the cancellation of his employment pass, *certiorari* must go to quash the said cancellation. Similarly here he said the plaintiff should have been given the opportunity to give his side of the story before the defendant proceeds to revoke the results of the July examination.

The defendant submitted that the right of hearing is not an inflexible rule. In *Russel v. Duke of Norfolk* [1949] 1 All ER 109 at p. 118 Tucker LJ stated:

The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter to be dealt with and so forth.

In this case the defendant contended that the *audi alteram partem* rule is excluded on the following grounds namely:

(a) urgency of the matter;

(b) it is impracticable to hold a hearing because of the large number of candidates involved;

(c) interest of the society; and

(d) public interest.

Firstly I must say I fail to see the distinction between grounds (c) and (d) above. Be that as it may, I do not think interest of society or public interest could be a bar to a right of hearing in the present case. The first two grounds seem to be the more plausible one. On the first ground the defendant contended that, just as the defendant in *Bishop v. Ontario Securities Commission* [1964] 41 DLR (2d) 24, the defendant here, has to act with a sense of urgency and promptitude as the plaintiff and other candidates deserved to obtain their results as quickly as practicable. It is common knowledge that some candidates who had been informed that they had passed their examination had started chambering. Therefore, the defendant contended that it is necessary for the defendant to decide quickly. Secondly, the defendant contended it is not practicable to hold a hearing because of the large number of candidates involved; of not less than 300 in all. In *Re Canadian Forest Products Ltd.* [1960] 24 DLR (2d) 753 at p. 759 Verchere J quoting from S.A. de Smith, *"Judicial Review of Administrative Action"*, 1959 said:

> At p. 122 of his treatise, *supra*, Mr. de Smith, in discussing the exceptions to the *audi alteram partem* rule says: 'Thus, it can hardly be doubted that the rule will be held to be impliedly excluded in a situation where the number of persons affected by a particular act or class of decisions is so great as to make it manifestly impracticable for them all to be given an opportunity to be heard by the competent authority before the decision takes effect. The appropriate safeguard in such a case is to provide by statute an opportunity for persons who consider themselves especially aggrieved to be heard.

There is no such provision as envisaged by de Smith in the Act. However, the defendant did invite the candidates who were dissatisfied with the revised results of the examination to appeal. The plaintiff was one of the those candidates who appealed against the decision of the defendant. (See exh. "H" annexed to Dato' Abdul Wahab's affidavit.) The right of appeal even though administrative in nature as opposed to a statutory right of appeal, did give the plaintiff a right of hearing *albeit* after the revocation of the July examination results. In his appeal the plaintiff stated:

> I had a clear pass for the July 2001 CLP examination. On regrading I was failed, something which is less favourable then what I had earlier on even though there's no impropriety on my part. Natural justice just would not allow this.

> I appealed to your goodself to reinstate my July 2001 pass result as that is the result which is announced and approved by the Board of which I am not a party to.

Judging from the content of the plaintiff's letter I don't think any hearing would have made any difference. The plaintiff himself stated there was no impropriety on his part, and the defendant never for a moment alleged that there was any impropriety or blameworthiness on the part of the plaintiff for this unfortunate episode. On that ground alone it could be argued that there is no necessity in the circumstances of this case for the right of hearing to be given to the plaintiff or any other candidates before the decision to revoke the July examination results was taken by the defendant. Abdoolcader J (as he then was) in *Merdeka University Bhd. v. Government of Malaysia* [1981] CLJ 175; [1981] CLJ (Rep) 191 stated:

> In *Malloch v. Aberdeen Corporation Lord Reid* (at page 1582) thought that if it could be clearly demonstrated that whatever the appellant in that case said could make no difference, that 'might be a good answer' and Lord Wilberforce said (at page 1595): 'A breach of procedure, whether called a failure of natural justice, or an essential administrative fault, cannot give him a remedy in the courts, unless behind it there is something of substance which has been lost by the failure. The court does not act in vain.' This seems to imply that the discretion to refuse a remedy may be exercised when the court judges that natural justice would make no difference or that there was no prejudice.

For the above reasons I agree with the submission of Tan Sri Zaki that in the circumstances of this case it is not practicable for the right of hearing to be given to the plaintiff or any other candidates and any hearing would not have made any difference. Thus based on the facts of this case, I think the plaintiff has not in any way been prejudiced by the failure on the part of the defendant to afford him the right of hearing, hence such a failure could not vitiate the decision to revoke the July examination results.

Mala Fide

The plaintiff's counsel further contented that the defendant's decision in revoking the July examination results was made *mala fide* within the meaning of the words as stated in *Karam Singh v. Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 MLJ 129. At p. 144 Suffian FJ (as he then was) said:

> All this goes to show; it is said, *mala fides* meaning not personal animosities towards the appellant, but a casual and cavalier attitude, and inadequate consideration on the part of the authorities as to the necessity for the appellant's detention, and this, on the authority of cases decided by the Supreme Court, of which I need mention only four, namely *Dwarka Dass v. State of Jammu & Kashmir, Ram Manohar v. State of Bihar, Jagannath Misra v. State of Orissa* and *Sadanandan v. State of Kerala & Anor*, invalidates the order of detention and renders the appellant's detention unlawful.

Mr. Karpal said that judging from what had transpired in this case it shows that the defendant had acted in a casual and cavalier manner. He said the defendant decided to revoke the July examination results even before investigation was completed by the police. In fairness to the plaintiff, he said, the defendant should have waited for the police investigation to be completed before revoking the July examination results.

In reply Tan Sri Zaki submitted that the defendant could not wait for the completion of police investigation before taking the necessary action because of the urgency of the matter. He also said, in any event police investigation is a separate matter and the defendant has no access to the police investigation papers. Further police investigation may take a long time. The defendant, he said, is far from being casual and cavalier in handling the matter. It held numerous meetings, with long hours, and heard the representations made by the candidates, the Malaysian Bar Council and the public before coming to its decision.

I find there is substance in what was said by Tan Sri Zaki. Police investigation papers as we all know are secret documents which are not accessible to the defendant. Furthermore, police investigation may take a long time and even after it is completed the plaintiff may again argue that it is not conclusive until the court decides on the matter. Here, as the defendant had stated, time is of the essence and the defendant has to act fast in order to put matters to rest. From the conduct of the defendant as disclosed in Dato' Abdul Wahab's affidavit I am of the opinion that the defendant is far from being casual or cavalier in its attitude. The defendant may of course be criticised for approving and endorsing the July examination results as presented to it by the Director, to borrow the words of Mr. Karpal, "without any quiver". But this, to my mind, does not have any bearing on the subsequent actions of the defendant.

The plaintiff's counsel further argued that the defendant should take the responsibility for the conduct of its Director who is the defendant's employee. Perhaps, I must emphasise that this court is not sitting in judgment over the conduct of the Director. The issue before this court is whether the decisions of the defendant in revoking the July examination results and the subsequent regrading exercise is justified in all the circumstances of the case.

Having considered the matter I find that the conduct of the defendant in this whole episode is far from being *mala fide*.

Doctrine Of *Ultra Vires*

It is the defendant's contention that its actions in approving and endorsing the initial results of the July examination were *ultra vires* its power as they were based on a mistake of fact as represented to the defendant by the Director. It

is common ground that the CLP is by gazette notification No. P.U.(B) 123/ 1984 recognised as one of the qualifications sufficient to make a person a qualified person for the purposes of Act. Thus, by issuing the CLP to the plaintiff, he becomes a qualified person under the Act and this would give the plaintiff certain rights and privileges under the Act. Upon investigation it was discovered that the plaintiff had not passed the July examination as the plaintiff failed to obtain the requisite marks for two of the papers. This fact has not been contraverted by the plaintiff. Therefore, the defendant's evidence must stand. (See *Ng Hee Thoong & Anor v. Public Bank Bhd.* [1995] 1 CLJ 609, *Alloy Automative Sdn. Bhd. v. Perusahaan Ironfield Sdn. Bhd.* [1986] 1 CLJ 2; [1986] CLJ (Rep) 45). On that premise the defendant contended that it has acted *ultra vires* its powers in issuing the CLP to the plaintiff. Tan Sri Zaki further submitted that any administrative act or order which is *ultra vires* or outside jurisdiction is void in law, ie, deprived of any legal effect. This is because an order to be valid it needs statutory authorisation, and if it is not within the powers given by the Act, it has nothing to stand on. Further, he said if the court is with him on this point the net result would be as if nothing has happened and the defendant is free to substitute the actual results of the July examination for the initial one without having to revoke the same. In support he cited the case of *Rootkin v. Kent County Council* [1981] 2 All ER 227. In that case:

> The plaintiff's daughter was allocated a place in a secondary school which, according to measurements made by the local authority, was a little over three miles from the plaintiff's home. The local authority was therefore under a duty, by virtue of s. 39(2) of the Education Act 1944, to provide transport for, or reimburse the travelling expenses of, the plaintiff's daughter to and from school. The authority accordingly decides, in the exercise of the discretion conferred on it by s. 55(2) of the 1944 Act to 'pay the whole or any part, as the authority think fit, of the reasonable travelling expenses' of a school pupil, to issue a bus pass to the plaintiff's daughter entitling her to free bus travel to and from the school at the authority's expense. A short time later the authority made a more precise measurement of distance between the plaintiff's house and the school and found the distance to be less than three miles. The authority withdrew the bus pass in accordance with its policy that if the distance was less than three miles and there were no special circumstances the child should walk to school or pay his own fare. The plaintiff applied to the Divisional Court for a judicial review of the authority's decision to withdraw the bus pass but that was refused. She appealed to the Court of Appeal, contending (i) that the authority was not entitled to rescind its determination that a bus pass should be issued once it had made that determination, and (ii) that the authority was, in the circumstances, estopped from revoking its decision.

Lawton LJ at p. 233 said:

> It is against that background that I now have to look at what happened in this case. The council, at the end of July 1976, did decide to exercise their discretion under s. 55(2). It is accepted that the divisional education officer was duly authorised by them to make the decision. He made his decision under a mistake of fact, namely that the diference from Helen's home to the school was more than three miles. On the basis of that mistake of fact, and pursuant to the decision to *Surrey County Council v. Ministry of Education*, he, as an officer of the council authorised to exercise his discretion, was bound to authorise the reimbursement to the appellant of the cost of travelling. He performed his duty by authorising the issue of a yearly bus ticket. But when the mistake of fact was discovered in November 1976 he was duty bound, as I see it, to the council to reconsider the matter because on the facts as he knew them in November 1976 there was no duty to issue a bus season ticket to Helen. I can see no reason in law why he should not have reconsidered the matter when he found that a mistake had been made about the distance.
>
> It was submitted to us on the authority of a number of cases, of which the last in order of time was *Re 56 Denton Road, Twickenham, Middlesex* [1952] 2 All ER 799, [1953] Ch 51, that what the divisional education officer was doing was making a determination and, having once made a determinations, he was not entitled to go back on it. In my judgment, that is a misconception.
>
> It is the law that if a citizen is entitled to payment in certain circumstances and a local authority is given the duty of deciding whether the circumstances exist and if they do exist of making the payment, then there is a determination which the local authority cannot rescind. That was established in *Livingston v. Westminster Corpn.* [1904] 2 KB 109. But that line of authority does not apply in my judgment to a case where the citizen has no right to a determination on certain facts being established but only to the benefit of the exercise of a discretion by the local authority. The wording of s. 55(2) of the 1944 Act is far removed from the kind of statutory wording which was considered in *Re 56 Denton Road, Twickenham* and *Livingston v. Westminster Corpn*. I cannot, for my part, see any basis for the submission that the decision of the divisional education officer in July 1976 was irrevocable when he found out what the true facts were.

In the present case there is ample evidence to show that the CLP dated 13 September 2001 issued to the plaintiff was based on the master list presented by the Director to the defendant. The defendant was satisfied, after due investigation, that the results as shown in the master list were erroneous. I don't think it is open to this court to interfere with the evaluation of evidence or conclusions of fact reached by the defendant unless it is satisfied that the defendant had misdirected itself on law. In *Reg. v. Criminal Injuries Compensation Board Exp. A* [1999] 2 AC 330 at p. 343 L. Slynn of Hadley said:

> The board did, of course, have to evaluate the evidence and they were entitled to accept one side rather than the other, so that in the ordinary way the court would not interfere with their finding on an application for judicial review. The application for judicial review is not an appeal on fact.

The principle behind the approach is that judicial review is concerned with the legality and not the merits of a decision; accordingly it is not open to me to examine the evidence with a view to forming my own view about the substantial merits. (See *Tesco Stores Ltd. v. Secretary for the Environment* [1995] 2 All ER 636 at 657.) In *Reid v. Secretary of State for Scotland* [1999] 2 AC 517 at p. 541 L. Clyde said:

> Judicial review involves a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view to forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from the procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or of sufficient evidence, to support it, or through account being taken of irrelevant matter, or through a failure for any reason to take account of a relevant matter, or through some misconstruction of the terms of the statutory provision which the decision-maker is required to apply. But while the evidence may have to be explored in order to see if the decision is initiated by such legal deficiencies it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence.

Having considered the evidence before the court I am unable to find any defect or deficiency in the finding of the defendant as stated by L. Clyde above. On the contrary I find there is sufficient evidence before the defendant to support its decision to revoke the July examination results. In short the defendant had properly exercised its discretion in revoking the July examination results.

Another factor to be considered in deciding whether a decision by an administrative body can be revoked or not is to see whether public interests is in favour of revocation as opposed to the private interests of the beneficiary. In *Re Liverpool Corporation, exp. Liverpool Taxi Fleet Operators Association* [1975] 1 WLR, L. Denning said that a public authority which has given an undertaking can depart from that undertaking "only if they are satisfied that the overriding public interest requires it" and it is contended that this principle ought to apply to revocation of administrative decisions. It is submitted for the defendant in this case that public interest far outweighs the private interest

of the plaintiff. Tan Sri Zaki submitted that public interest in fact demands that the defendant ought to revoke the results of the July examination in order to preserve the image and integrity of the legal profession in this country. In this regard I totally agree with the view expressed by Tan Sri Zaki and I hold that the defendant may in the circumstances of this case revoke the July examination results and regrade the candidates in accordance with the marks given by the examiner or examiners.

Conclusion

To conclude, I hold that this application could not appropriately be made under s. 26 of the Act, and even if I am wrong on this point, nevertheless, for the reasons given above, I would have dismissed the application on the merits. In the result the application is dismissed with costs.